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No. 01-835

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THE STATE OF SAO PAULO OF THE FEDERATIVE REPUBLIC OF BRAZIL

Petitioners,

— v. —

THE AMERICAN TOBACCO CO., ET AL.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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113

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QUESTION PRESENTED

As discussed below, by virtue of consolidated proceedings now pending in the D.C. Circuit (the decision of which is expected shortly), either the instant petition will become moot or the case will be put in a procedural posture clearly rendering it an inappropriate vehicle for review of any question Petitioner claims it presents. *See* pp. 17-19, *infra*.-Moreover, this case does not in any event present the question stated in the petition; this is not a case — such as Petitioner contends — where recusal was directed simply because a district judge had "a 'pre-judicial association' with a position or counsel." Pet. i (Question Presented). Rather, Respondents submit that the following question more accurately reflects the factual grounds underlying the Fifth Circuit's holding that recusal was required in this case:

> Did the Fifth Circuit correctly hold, based upon its "extremely fact intensive and fact bound .... examination of the facts and circumstances of the particular claim" (Pet. App. 34a), that the district court abused its discretion when it failed to recuse notwithstanding the appearance of partiality resulting from the judge, pre-appointment, having held key leadership roles in an organization which, in an earlier tobacco case, had submitted an *amicus* brief, under motion bearing the judge's name as President, expressing strident positions adverse to many of the same defendants in this case on issues common to both cases?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Philip Morris Companies Inc. does not have any parent corporations and there is no publicly held company that owns 10% or more of Philip Morris Companies Inc.'s stock.

Respondent Philip Morris Incorporated has the following parent corporation:

Philip Morris Companies Inc.

Philip Morris Companies Inc. is the only publicly held company that owns 10% or more of Philip Morris Incorporated's stock.

Respondent R.J. Reynolds Tobacco Company has the following parent corporation:

R.J. Reynolds Tobacco Holdings, Inc.

R.J. Reynolds Tobacco Holdings, Inc. is the only publicly held company that owns 10% or more of R.J. Reynolds Tobacco Company's stock.

Respondent Brown & Williamson Tobacco Corporation has the following parent corporations:

B.A.T Industries p.l.c.
BATIC Inc.
BATUS Holdings Inc.
BATUS Tobacco Services, Inc.
British American Tobacco p.l.c.
British American Tobacco (1998) Ltd.
British-American Tobacco (Holdings) Ltd.
Louisville Securities Ltd.

British American Tobacco p.l.c. is the only publicly held company that owns 10% or more of Brown & Williamson Tobacco Corporation's stock.

Respondent BATUS Holdings, Inc. has the following parent corporations:

B.A.T Industries p.l.c.
British American Tobacco p.l.c.
British American Tobacco (1998) Ltd.
British-American Tobacco (Holdings) Ltd.
Louisville Securities Ltd.

British American Tobacco p.l.c. is the only publicly held company that owns 10% or more of BATUS Holdings, Inc.'s stock.

Respondent BATUS, Inc. has the following parent corporations:

B.A.T Industries p.l.c.
BATUS Holdings, Inc.
British American Tobacco p.l.c.
British American Tobacco (1998) Ltd.
British-American Tobacco (Holdings) Ltd.
Louisville Securities Ltd.

British American Tobacco p.l.c. is the only publicly held company that owns 10% or more of BATUS, Inc.'s stock.

Respondent American Brands, Inc. (now known as Fortune Brands, Inc.) does not have any parent corporations and there is no publicly held company that owns 10% or more of American Brands, Inc.'s stock.

Respondent The Tobacco Institute, Inc. does not have any parent corporations and there is no publicly held company that owns 10% or more of The Tobacco Institute, Inc.'s stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
STATEMENT OF THE CASE	1
A. *Panama*	1
1. The *Panama* complaint	1
2. Defendants' recusal motion	3
3. Proceedings in the *Panama* action	8
4. Defendants' appeal to the Fifth Circuit	12
B. *Sao Paulo*	13
C. Proceedings in the District of Columbia	15
REASONS FOR DENYING THE WRIT	17
I. THE INSTANT PETITION WILL EITHER SHORTLY BECOME MOOT AND/OR THE PROCEDURAL POSTURE OF THE ACTION WILL RENDER CERTIORARI INAPPROPRIATE	17

II. THE DECISION BELOW WAS A FACT-BOUND DETERMINATION AND DOES NOT PRESENT THE QUESTION THAT PETITIONER CONTENDS IT PRESENTS	19
III. PETITONER HAS FAILED TO SHOW THAT THE COURT OF APPEALS RENDERED A DECISION IN CONFLICT WITH ANY DECISION OF THIS COURT OR ANY OTHER COURT OF APPEALS	27
A. No conflict with any decision of this Court	27
B. No conflict with any decision of any other court of appeals	29
CONCLUSION	30

TABLE OF AUTHORITIES

Cases: **Page**

Allegheny Gen. Hosp. v. *Philip Morris*, 228 F.3d 429 (3d Cir. 2000).....15n

Association of Washington Pub. Hosp. Dists. v. *Philip Morris*, 241 F.3d 696 (9th Cir.), *cert. denied*, 122 S. Ct. 207 (2001).....15n

Gilboy v. *American Tobacco Co.*, 582 So. 2d 1263 (La. 1991).....4

Hall v. *Small Bus. Admin.*, 695 F.2d 175 (5th Cir. 1983).....25, 27

Health Care Serv. v. *Brown & Williamson*, 208 F.3d 579 (7th Cir. 2000).....15n

In re Initial Public Offering Sec. Litig., 174 F. Supp. 2d 70 (S.D.N.Y. 2001).....23-24

In re School Asbestos Litig., 977 F.2d 764 (3d Cir. 1992).....25

In re Tobacco (Guatemala), 83 F. Supp. 2d 125 (D.D.C. 1999).....2

In re Tobacco (Venezuela), 100 F. Supp. 2d 31 (D.D.C. 2000).....16n

Ivy v. *Diamond Shamrock Chems. Co.*, 901 F.2d 7 (2d Cir. 1990).....11n

Johnson v. *AMR Corp.*, 1996 WL 164415 (N.D. Ill. Apr. 3, 1996).....11n

Laborers Local v. *Philip Morris*, 191 F.3d 229 (2d Cir. 1999), *cert. denied*, 528 U.S. 1080 (2000).....15n

Liljeberg v. *Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988).....24, 25, 27

Liteky v. *United States*, 510 U.S. 540 (1994).....24, 28-29

Lyons v. *Philip Morris*, 225 F.3d 909 (8th Cir. 2000).....15n

Medical Soc'y of the State of New York v. *Connecticut Gen. Corp.*, 2001 WL 1328366 (S.D.N.Y. Oct. 26, 2001).....11n

Oregon Laborers v. *Philip Morris*, 185 F.3d 957 (9th Cir. 1999), *cert. denied*, 528 U.S. 1075 (2000).....15n

Regence BlueShield v. *Philip Morris*, 2001 WL 205996 (9th Cir. Feb. 28, 2001).....15n

Republic of Bolivia v. *Philip Morris*, 39 F. Supp. 2d 1008 (S.D. Tex. 1999).....2-3, 9

Republic of Guatemala v. *Tobacco Institute*, 249 F.3d 1068 (D.C. Cir.), *cert. denied*, 122 S. Ct. 463 (2001).....2, 15, 18

Republic of Panama v. *American Tobacco*, 217 F.3d 343 (5th Cir. 2000).....1, 12

Rio de Janeiro v. *Philip Morris*, 239 F.3d 714 (5th Cir. 2001).....10n

Sao Paulo v. *American Tobacco*, 250 F.3d 315 (5th Cir. 2001).....1, 14

Steamfitters v. *Philip Morris*, 171 F.3d 912 (3d Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000).....15n

Teamsters v. *Philip Morris*, 196 F.3d 818 (7th Cir. 1999) 15n

Texas Carpenters v. *Philip Morris*, 199 F.3d 788 (5th Cir. 2000).....15n

Tramonte v. *Chrysler Corp.*, 136 F.3d 1025 (5th Cir. 1998).....12n

TRW Inc. v. *Andrews*, 122 S. Ct. 441 (2001)..... 27-28

UFCW v. *Philip Morris*, 223 F.3d 1271 (11th Cir. 2000) 15n

Statutes and Rules:

28 U.S.C. § 455(a)..... 12, 24, 27, 28-29, 30

28 U.S.C. § 455(b) 28-29

28 U.S.C. § 1404 9

Other Authorities:

Model Rules of Prof'l Conduct R. 1.2. 25

STATEMENT OF THE CASE

The subject of the instant petition, the decision of the Fifth Circuit in *Sao Paulo* v. *American Tobacco*, 250 F.3d 315 (5th Cir. 2001) (Pet. App. 17a-28a), is a two-paragraph *per curiam* order predicated upon a prior decision of the same court a year earlier in an appeal presenting the identical issues. *Republic of Panama* v. *American Tobacco*, 217 F.3d 343 (5th Cir. 2000) (Pet. App. 29a-39a).* Accordingly, it is necessary to set forth the proceedings and decision in the *Panama* case as well as *Sao Paulo* in order to have an understanding of the decision below. Moreover, *Panama* and *Sao Paulo* are but two of the many substantially identical foreign-government cases filed against the tobacco companies that have been consolidated for pretrial purposes in the District of Columbia; the proceedings in the District of Columbia are highly germane to the mootness/appropriateness-of-review issue discussed below and are therefore also set forth herein.

A. *Panama*

1. The *Panama* complaint

Panama was the second of what are now some 36 foreign governments that have filed lawsuits in American courts against the American tobacco industry. These foreign-government lawsuits all claim that the tobacco companies concealed the health risks of smoking, and that, had the foreign governments been aware of smoking's health risks, they would have adopted different policies with respect to smok-

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* Citations in the form "Pet. App. __" are to the appendix attached to the petition. Citations in the form "Resp. App. __" are to the appendix attached to this opposition. Citations in the form "Sao P. RE__:__" are to the Record Excerpts submitted to the Fifth Circuit in the *Sao Paulo* appeal. Citations in the form "Pan. RE__:__" are to the Record Excerpts submitted to the Fifth Circuit in the *Panama* appeal. Citations in the form "Pan. R__:__" are to the complete Record on Appeal in *Panama*.

ing; these policies would have led to decreased smoking by their citizens; and this reduced smoking would have led to lower health care costs for the foreign governments. (Pan. RE8:99-100,122-23,136).* The foreign governments thus seek through these lawsuits to recover on a mass-aggregated basis for medical expenses paid with respect to hundreds of thousands — if not millions — of unidentified individual smokers, while seeking to strip defendants of the defenses that would be available to them if sued by the smokers themselves. (Pan. RE8:98,100,122,126,128,136-37).

On June 10, 1999, the Judicial Panel on Multidistrict Litigation (on defendants' motion) directed that all such actions pending in the federal courts be consolidated for pretrial purposes in the District of Columbia. (Pan. RE17:275-78). As to those of the foreign-government cases that were originally brought in the federal courts, the District of Columbia District Court subsequently granted dismissal for failure to state either federal or state law claims; the D.C. Circuit affirmed those dismissals; this Court denied certiorari. *In re Tobacco (Guatemala)*, 83 F. Supp. 2d 125, 126 (D.D.C. 1999), *aff'd sub nom.*, *Republic of Guatemala* v. *Tobacco Institute*, 249 F.3d 1068 (D.C. Cir.), *cert. denied*, 122 S. Ct. 463 (2001).

A number of the foreign government plaintiffs — including Panama and Sao Paulo — however, originally brought suit not in federal court, but in hand-picked state-court forums bereft of any connection to the parties or the matters in dispute. *See*, *e.g.*, *Republic of Bolivia* v. *Philip Morris*, 39 F. Supp. 2d 1008, 1009 (S.D. Tex. 1999) (noting upon removal that "the Court can hardly imagine why the Republic of Bolivia elected to file suit in the veritable hin-

* The *Panama* complaint and the later-filed *Sao Paulo* complaint are virtual carbon copies of each other. To avoid repetition, cites herein are to either complaint as appropriate. The same points apply to both.

terlands of Brazoria County, Texas. The Court seriously doubts whether Brazoria County has ever seen a live Bolivian … even on the Discovery Channel.").

As for the *Panama* lawsuit, it was originally filed on August 26, 1998 in Louisiana state court (Orleans Parish). After defendants removed the case to the Eastern District of Louisiana — in part on the grounds that the complaint contained allegations purporting to raise a federal antitrust claim — Panama voluntarily dismissed its original action. Two months later, however, Panama refiled a complaint in the same state court, this time omitting the federal antitrust allegations. Defendants again removed the case on November 5, 1998 — both on diversity and an additional federal-question ground — and the action was assigned to District Judge Carl J. Barbier. On December 3, 1998, Panama moved to remand.

2. Defendants' recusal motion

Before responsive papers were filed upon Panama's remand motion, defendants on January 5, 1999 filed a motion seeking Judge Barbier's recusal pursuant to 28 U.S.C. § 455. (Pan. R2:247-91). The basis of the motion was the appearance of partiality created by the public association of Judge Barbier with a Louisiana Trial Lawyers Association *amicus* brief filed in 1991 with the Louisiana Supreme Court in *Gilboy* v. *American Tobacco Co.*, a case involving a number of the same defendants here.

The facts underlying the recusal motion may briefly be summarized. Before his confirmation as a federal judge in September 1998, Judge Barbier was a member of the Louisiana Trial Lawyers Association. He served a one-year term as President of that organization from the fall of 1989 until the fall of 1990. Thereafter, he served as Past President and as a member of the Association's Executive Committee. (Pan. RE7:62-63,91-92).

On April 30, 1991, the Association submitted an *amicus* brief to the Louisiana Supreme Court in a product-liability case styled *Gilboy* v. *American Tobacco Co.* (Resp. App. 6a-29a), an action against a number of the same tobacco defendants named here. *See* 582 So. 2d 1263 (La. 1991). The Louisiana Trial Lawyers Association's motion to file that brief was subscribed:

> Respectfully Submitted,
>
> LAWRENCE S. KULLMAN (#7884)
> Chairman, Amicus Curiae Committee
> Louisiana Trial Lawyers Association
>
> CARL J. BARBIER, President
> Barbier & Cumberland
> Louisiana Trial Lawyers Association
>
> MICHAEL ST. MARTIN
> St. Martin, Lirette & Shea
> Amicus Curiae Committee
> Louisiana Trial Lawyers Association
>
> * * *

(Resp. App. 2a (addresses and phone numbers omitted)). Mr. St. Martin is now counsel for Panama and Sao Paulo in these cases. The official reported decision of the Louisiana Supreme Court in *Gilboy* lists "Lawrence S. Kullman, Carl Joseph Barbier, Michael X. St. Martin, Adolph J. Levy, New Orleans, for Louisiana Trial Lawyers Ass'n amicus curiae." *Gilboy*, 582 So. 2d at 1263-64.

Gilboy was an important tobacco case involving four of the same defendants named here* and many of the same disputed factual and legal issues pleaded in these cases. The *Gilboy amicus* brief identified the following among the issues in the case:

1. Should the defendants have warned that smokers could become addicted to nicotine?

2. Was plaintiff's failure to stop smoking "voluntary"?

3. Did plaintiff fail to stop smoking because he was addicted to nicotine?

4. What percent of fault lies with plaintiff and what percent of fault lies with defendants?

5. Assuming, for the sake of argument, that actual knowledge of the defendants was required, did defendants have actual knowledge that they were causing people to become addicted?

6. Should defendants have known of the scientific literature of the 1900s that smokers were becoming addicted to nicotine?

7. Were defendants negligent in failing to warn the plaintiff of health and addiction risks?

8. Are cigarettes unreasonably dangerous?

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* The American Tobacco Company, R.J. Reynolds Tobacco Company, Lorillard, Inc., and The Tobacco Institute.

(Resp. App. 28a-29a). The *Panama* complaint (and the *Sao Paulo* complaint) raise many of the same and similar issues that were raised by the *Gilboy* brief.*

Then, including in a section titled "Facts," the *Gilboy amicus* brief — which Petitioner tellingly chose to omit from the appendix to its petition — expressed starkly unfavorable views with regard to the tobacco companies, often in the most strident terms. For example:

- "The companies will continue to *sell cancer* until they know that they will have to pay for the needless deaths and the needless suffering that they inflict." (Resp. App. 12a-13a) (emphasis added).

- "In our view, cigarette manufacturers, but not members of the public, knew from the early 1900s that cigarettes were addictive." (Resp. App. 9a).

- "[D]efendants should not be able to benefit from the addiction that they caused." (Resp. App. 9a).

- "They refuse to place any warning labels on any cigarettes that they export unless the importing country requires the warnings. They don't even warn about cancer. So much for their good faith." (Resp. App. 12a).

- "[T]he original warnings on cigarettes were indeed inadequate. The tobacco companies, for obvious reasons, never gave the following warning: '*We will get you as*

* For example, the *Panama* (and *Sao Paulo*) complaints allege that cigarettes were unreasonably dangerous (Pan. RE8:99), that defendants had notice of potential health hazards since at least the late 1930s (Pan. RE8:106), and that defendants had actual knowledge that nicotine users were addicted. (Pan. RE8:108). *See also* Pan. RE8:98,110 (addictiveness); Pan. RE8:124,125 (unreasonably dangerous); Pan. RE8:98-99,107, 114,121,123,124,134.

hooked on cigarettes as you would be on heroin.'" (Resp. App. 14a) (emphasis added).

- "Cigarettes are unreasonably dangerous per se because they *make people addicts and because they kill people.*" (Resp. App. 22a) (emphasis added).

- "The defendants are liable under strict liability. They are also liable for their negligence in producing a product that was more dangerous than it was intended to be. They are also liable because they knew or should have known of the addictive character of their cigarettes and were therefore negligent in failing to warn smokers that their cigarettes convert smokers into addicts." (Resp. App. 22a).

- "[Cigarettes] are unreasonably dangerous per se." (Resp. App. 23a).

- "Were the defendants also negligent in failing to warn about the addiction? Certainly they were." (Resp. App. 23a).*

Nonetheless, Judge Barbier informed defendants following the recusal issue being raised that he had never actually acted as counsel in *Gilboy* and that his term as President of the Association had ended six months before the *amicus*

* Again, the factual *conclusions* asserted in the *Gilboy amicus* brief bear striking similarity to the factual *allegations* asserted in the *Panama* (and *Sao Paulo*) complaint. Compare, *e.g.*, Pan. RE8:123 ("Each of the Defendants knew, or should have known, about the adverse impact of the inhalation of cigarette smoke on the health of both users and bystanders. Instead of warning Plaintiff, intended users and the general public about these dangers, the Defendants ignored, or actively and fraudulently concealed such information ... in order to sell cigarettes .... Additionally, the Defendants not only concealed the hazards of cigarette smoking but also actively represented cigarettes as safe. Such actions and/or inactions constitute gross negligence ...."); Pan. RE8:125 ("Cigarettes are inherently, abnormally, and unreasonably dangerous"); *see also* Pan. RE8:99,100,126.

brief was filed. (Pan. RE6:46). Upon argument of the motion, Judge Barbier further stated that exclusive responsibility for submitting *amicus* briefs rested with the Association's Amicus Committee, not with him. (Pan. RE7:90-92). Judge Barbier did not question, however, that he *did* continue to serve on the Association's Executive Committee and Board of Governors — its key governing bodies — at the time the brief was filed and thereafter, and was Past President at the time of filing. (Pan. RE7:62-63). Nor did he at any time in any way disavow holding the strenuous anti-tobacco company sentiments expressed in that *amicus* brief. Nevertheless, as set forth below, Judge Barbier denied recusal.

3. Proceedings in the *Panama* action

As noted above, the *Panama* action was removed on November 5, 1998, and assigned to Judge Barbier; on December 3, 1998, Panama filed its remand motion; defendants for the reasons set forth above — and before Judge Barbier had taken any action in the matter — on January 5, 1999, then filed their motion for recusal. That motion was denied on February 3, 1999.

By the beginning of February 1999, the number of lawsuits brought in American courts by foreign governments against the tobacco industry had jumped from two to six. Given the multiplicity of substantially similar actions pending in six different federal courts, defendants in February 1999 moved before the Judicial Panel on Multidistrict Litigation to have all such actions consolidated for pretrial proceedings in the District of Columbia federal court pursuant to 28 U.S.C. § 1407. (Pan. R3:320-42). Defendants' papers before the MDL Panel emphasized the importance of avoiding inconsistent pretrial rulings in these matters involving sovereign governments as litigants in American courts.

Defendants thereupon filed a motion before the district court in the *Panama* action seeking — in light of the pendency of the MDL motion — to continue without date any hearing on Panama's remand motion. (Pan. R3:314-15). In communication with defendants' counsel, Panama actually *consented* to this motion, and the district court was so advised. (Pan. R3:314-15). Nevertheless, on February 19, the district court *denied* this unopposed motion — citing (without further explication) "the procedural history of this case to date." (Pan. RE4:21-22). The district court's order stated that it was without prejudice to defendants upon oral argument of the remand motion requesting that the court withhold ruling. (Pan. RE4:21-22).

Accordingly, on February 23, 1999, defendants proceeded not only to interpose papers in opposition to Panama's remand motion, but to file a cross-motion (with supporting papers) asking that ruling on the remand motion be withheld pending the MDL Panel's resolution of the MDL motion. Similar stays were sought in each of the other actions subject to the MDL motion (other than the first-filed *Guatemala* case, which was already pending in the District of Columbia — the proposed transferee court — having been brought there). In the two other removed actions, the courts either stayed all proceedings or themselves granted transfer to the District of Columbia under 28 U.S.C. § 1404. Thus: (1) in the action brought by Venezuela, the Southern District of Florida Court on April 28, 1999 stayed all proceedings pending resolution of the MDL motion (Pan. RE10:163-65); and (2) in the action brought by Bolivia, the Southern District of Texas Court on March 1, 1999, even before a stay application was made, *sua sponte* transferred the case in the interest of justice pursuant to 28 U.S.C. § 1404 to the District of Columbia for *all* purposes. *Republic of Bolivia* v. *Philip Morris*, 39 F. Supp. 2d 1008 (S.D. Tex. 1999). Stay motions were also granted in each of the other potential MDL cases not already pending in the Dis-

trict of Columbia. (Pan. RE11:166-67 (*Nicaragua* case); (Pan. RE12:168 (*Thailand* case)).*

Judge Barbier, however, did *not* grant defendants' stay motion, but rather scheduled argument on that motion for March 17, 1999 simultaneous with argument on the remand motion itself — and argument on those motions was indeed held on that date. Shortly thereafter, the MDL motion was scheduled for May 21 argument. Defendants promptly advised the district court of that MDL motion hearing date and of their understanding that the historical practice of the MDL Panel was that — because the Panel is comprised of judges from across the nation — motions are decided immediately after oral argument, the decision is known within the federal judiciary almost immediately, and the opinion of the Panel issues to the public within about two or three weeks thereafter. (Pan. RE14:243; Pan. R6:1175-79). Thus, any grant of stay — or simple withholding of opinion by the district court — pending the MDL Panel ruling would be of exceedingly short duration.

The MDL motion was indeed heard by the MDL Panel on May 21. Less than three weeks later, on June 10, the MDL Panel did then publicly issue its decision *granting* defendants' motion and selecting the District of Columbia as the MDL forum. In particular, the MDL Panel held that con-

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* In addition to these grants of stay prior to the MDL consolidation having been granted, numerous district court judges have since formally or informally granted stays in 26 out of 27 of these foreign-government tobacco cases for the brief period necessary for final transfer by the MDL Panel to take place notwithstanding the pendency of a remand motion. *See, e.g.*, Order Granting Defendants' Motion for Stay and Staying Plaintiff's Motion to Remand in *State of Goias* v. *Philip Morris*, No. 99-3061 (S.D. Fla. Dec. 10, 1999). In the single such case where such stay was denied, upon appeal by defendants from that denial (and a resulting remand order), the Fifth Circuit concluded that it was without appellate jurisdiction to resolve the issue. *See Rio de Janeiro* v. *Philip Morris*, 239 F.3d 714 (5th Cir. 2001).

solidation was necessary in order to "prevent inconsistent pretrial rulings" in these cases — a matter the Panel found to be of "heightened importance, from the standpoint of the United States' conduct of foreign relations, in litigations involving foreign sovereign governments as plaintiffs." (Pan. RE17:276 (emphasis added)).

Nevertheless — *after* oral argument of the MDL motion (on May 21) but *before* public issuance of the MDL decision (on June 10) — the district court on May 28, 1999 issued an order denying a stay in the *Panama* case and granting remand. In its opinion, the district court set forth the view that there "[was] a likelihood" that the MDL motion would be denied — a less-than-clairvoyant prediction which was then publicly refuted less than two weeks later. (Pan. RE5:26).*

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* Contrary to Petitioner's suggestion that transferor courts somehow typically decide remand motions rather than stay their actions for the brief period necessary for final MDL transfer to take place (Pet. 4), the precise *opposite* is in fact the case. Indeed, the MDL Panel made this very point upon oral argument in *these very cases*: "transferor judges, for whatever reason and for good reasons, for crying out loud, don't act on these motions to remand very often ... they *almost always stay* their actions until the Panel acts .... They don't have to do it that way, but that is the way they do it." (Pan. RE15:271 (emphasis added)). Petitioners' assertion that the MDL Panel somehow instead had stated "that district courts should act on pending motions [to remand]" (Pet. 4) is flatly belied by the record. (Pan. RE15:271).

Indeed, as noted above, numerous district courts have now — formally or informally — stayed *26* of these very foreign-government cases for the brief period necessary for transfer to become final, notwithstanding the pendency of a remand motion. *See* p. 10 n.*, *supra*. And these numerous stays are fully consistent with the logical and widely prevailing practice. *See, e.g.*, *Medical Soc'y of the State of New York* v. *Connecticut Gen. Corp.*, 2001 WL 1328366, at *2-*3 (S.D.N.Y. Oct. 26, 2001) ("preferable practice" is to allow "the transferee court to resolve the jurisdictional question"; "there are significant economies in having a single court decide a jurisdictional question which has arisen and presumably will continue to arise in cases around the nation") (citing *Ivy* v. *Diamond Shamrock Chems. Co.*, 901 F.2d 7 (2d Cir. 1990)); *Johnson* v. *AMR Corp.*, 1996 WL 164415, at *4 (N.D. Ill. Apr. 3, 1996) ("Since the MDL

4. Defendants' appeal to the Fifth Circuit

Defendants appealed from the district court's orders denying recusal, denying a stay pending MDL transfer, and granting remand. On July 17, 2000, after briefing and oral argument, the United States Court of Appeals for the Fifth Circuit unanimously reversed the district court's denial of recusal — and consequently vacated the subsequent remand order. *Republic of Panama* v. *American Tobacco*, 217 F.3d 343 (5th Cir. 2000) (Pet. App. 29a-39a).*

The Fifth Circuit began its analysis by expressly noting:

> The review of a recusal order under § 455(a) is "extremely fact intensive and fact bound," thus a close recitation of the factual basis for the appellants' recusal motion is necessary .... The analysis of a § 455(a) claim must be guided, not by comparison to similar situations addressed by prior jurisprudence, but rather by an independent examination of the facts and circumstances of the particular claim.

Pet. App. 34a. The Fifth Circuit then analyzed the specific factual basis for recusal here, and determined based upon those specific facts that recusal was required. Pet. App. 34a-36a.

Notably, Panama (represented by the same counsel that represents Sao Paulo here) did *not* file any petition for rehearing (either by the panel or *en banc*). Nor did it file a petition for writ of certiorari. Accordingly, on August 8, 2000,

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will soon be looking at the forest as well as the trees, the best course is to postpone ruling on the present [remand] motion.").

* *See also, e.g.*, *Tramonte* v. *Chrysler Corp.*, 136 F.3d 1025, 1028 (5th Cir. 1998) (remand order vacated because district judge should have previously granted disqualification).

the Fifth Circuit's mandate in *Panama* issued, and the *Panama* case was reassigned to a different district judge in the Eastern District of Louisiana (Clement, J.).* Despite plaintiff's urging that the newly-assigned judge follow Judge Barbier's rulings and enter an immediate remand order, Judge Clement refrained from taking any such action; the case was then transferred by the MDL Panel to the District of Columbia for consolidated pretrial proceedings with all the other foreign-government cases already there pending. (The proceedings that have since taken place in the MDL are described below at pp. 15-17, *infra*.)

B. *Sao Paulo*

The *Sao Paulo* case was filed on February 9, 2000 (about a year and a half after *Panama*) by the same plaintiff's counsel in the same Louisiana state court. It has followed essentially the same procedural course — except that by the time *Sao Paulo* was brought, MDL treatment of these foreign-government cases had long previously been granted, the cases were being actively presided over by Judge Friedman in the District of Columbia, and Judge Barbier's refusal to stay and grant of remand came *after* a conditional transfer order transferring *Sao Paulo* itself to the District of Columbia as a "tag-along" action had already been issued by the MDL Panel.

Thus, in March 2000 — four months before the Fifth Circuit issued its decision in *Panama* — defendants removed *Sao Paulo* to the Eastern District of Louisiana, where the case was assigned to Judge Barbier as "related" to *Panama*. Defendants informed the MDL Panel of the pendency of the *Sao Paulo* case; the MDL Panel (in accordance with its rules) on April 7, 2000 proceeded to issue a conditional

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* Judge Clement has since been appointed to the United States Court of Appeals for the Fifth Circuit.

transfer order that, upon becoming final, would have transferred the *Sao Paulo* case to the MDL Proceeding in the District of Columbia with the others. *See Sao Paulo* order, MDL No. 1279 (J.P.M.L. April 7, 2000).

As in *Panama*, defendants filed a motion for recusal with the district court (predicated on the same grounds as in *Panama*) and a motion to stay for the brief period necessary for MDL transfer to become final. But once again — *before* final transfer of the *Sao Paulo* case to the District of Columbia could take place and, this time, long after the MDL Panel had ruled that these foreign-government cases *should* be consolidated for pretrial purposes in the District of Columbia — Judge Barbier proceeded to reach out to deny a stay and grant the *Sao Paulo* remand motion. Pet. App. 40a-47a.

On May 30, 2000, defendants filed a notice of appeal in *Sao Paulo*. Shortly thereafter, the Fifth Circuit proceeded to issue its unanimous decision in *Panama* reversing the denial of recusal. Given the squarely-on-point *Panama* precedent, proceedings on defendants' appeal in *Sao Paulo* were then summary in nature. Indeed, Sao Paulo, as appellee, submitted a four-page appellee's brief that expressly *conceded*: "appellee agrees that this court is bound by its prior decision in *Panama*, which will result in a reversal of the district court's denial of the motion to recuse and vacating of the order of remand without addressing the merits of said order." *Sao Paulo* 5th Cir. Br. at 3. Sao Paulo's brief further explicitly "pray[ed] that th[e] court enter an order in accordance with its prior decision in the *Panama* case." *Id.* at 4.

In light of Sao Paulo's explicit concessions in its appellee's brief that reversal was required, defendants submitted no reply brief, and the Fifth Circuit considered the *Sao Paulo* appeal without oral argument. On May 14, 2001, the Fifth Circuit issued its decision in *Sao Paulo* v. *American Tobacco*, 250 F.3d 315 (5th Cir. 2001) (Pet. App. 17a-28a).

Two of the Judges on the *Sao Paulo* panel (E. Garza and Stewart, JJ.) — both of whom had already participated as members of the *Panama* panel — joined in a two-paragraph *per curiam* order directing reversal based on the court's prior decision in *Panama*. Pet. App. 18a-19a. The third judge on the *Sao Paulo* panel (Parker, J.) issued a concurring opinion agreeing that *Panama* was binding on the panel, but arguing that the *Panama* case had been wrongly decided. Pet. App. 20a-25a. Sao Paulo then filed a motion for rehearing *en banc*, which was denied (with Judge Parker and five other judges dissenting). Pet. App. 2a-16a.

Upon the denial of rehearing, the Fifth Circuit proceeded to issue its mandate in *Sao Paulo*. As with *Panama*, the case was then reassigned within the Eastern District of Louisiana and then transferred by the MDL Panel to the District of Columbia for consolidated pretrial proceedings with the other foreign-government tobacco cases.

C. Proceedings in the District of Columbia

The *Panama* and *Sao Paulo* cases are thus now both pending in the District of Columbia District Court, along with numerous other such foreign-government cases (including eight brought by Sao Paulo's sister-states of Brazil).

All of these cases that were originally filed in *federal* courts have proceeded to final judgment of dismissal with prejudice. Thus, on May 22, 2001, the D.C. Circuit issued a decision unanimously affirming dismissal of the federally-filed foreign-government cases holding that "the nations' claims are 'too remote, contingent, derivative and indirect to survive.'" *Republic of Guatemala* v. *Tobacco Institute*, 249 F.3d 1068, 1076 (D.C. Cir. 2001).* Just three months ago,

* In so holding, the D.C. Circuit followed the decisions of all seven other courts of appeals which have likewise so ruled, each unanimously,

on October 29, 2001, this Court denied a petition for certiorari filed by three foreign governments with respect to that decision. *See* 122 S. Ct. 463 (2001).

As for those foreign-government cases that were filed instead in *state* courts and removed by defendants — including *Panama* and *Sao Paulo* — the D.C. Circuit presently has before it *sub judice* consolidated proceedings which squarely present the issue whether federal question jurisdiction exists over such foreign government actions or whether they should be remanded back to state courts. *See Republic of Venezuela, et al.* v. *Philip Morris*, Nos. 00-7213 through 00-7216, 00-7257, 00-7258 (D.C. Cir.).* Those proceedings have already been argued before the D.C. Circuit and a decision is expected shortly. In the interim, the D.C. District Court has

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in cases brought by other third-party health care payors and providers ranging from union funds to hospitals to Blue Cross insurers — and this Court has denied certiorari in all such cases in which it has been sought. *See Steamfitters* v. *Philip Morris*, 171 F.3d 912 (3d Cir.), *reh'g en banc denied* (Apr. 29, 1999), *cert. denied*, 528 U.S. 1105 (2000); *Oregon Laborers* v. *Philip Morris*, 185 F.3d 957 (9th Cir. 1999), *cert. denied*, 528 U.S. 1075 (2000); *Laborers Local* v. *Philip Morris*, 191 F.3d 229 (2d Cir.), *reh'g en banc denied* (Aug. 6, 1999), *cert. denied*, 528 U.S. 1080 (2000); *Teamsters* v. *Philip Morris*, 196 F.3d 818 (7th Cir.), *reh'g en banc denied* (Dec. 16, 1999); *Texas Carpenters* v. *Philip Morris*, 199 F.3d 788 (5th Cir. 2000); *Health Care Serv.* v. *Brown & Williamson*, 208 F.3d 579 (7th Cir. 2000); *UFCW* v. *Philip Morris*, 223 F.3d 1271 (11th Cir. 2000); *Lyons* v. *Philip Morris*, 225 F.3d 909 (8th Cir. 2000); *Allegheny Gen. Hosp.* v. *Philip Morris*, 228 F.3d 429 (3d Cir. 2000); *Association of Washington Pub. Hosp. Dists.* v. *Philip Morris*, 241 F.3d 696 (9th Cir.), *reh'g en banc denied* (Apr. 16), *cert. denied*, 122 S. Ct. 207 (2001); *Regence BlueShield* v. *Philip Morris*, 2001 WL 205996 (9th Cir. Feb. 28, 2001) (unpublished disposition).

* The district judge presiding over the MDL had concluded that federal jurisdiction was lacking over four such cases. *See In re Tobacco (Venezuela)*, 100 F. Supp. 2d 31 (D.D.C. 2000). Thereafter, the D.C. Circuit accepted for briefing and oral argument petitions for advisory and supervisory mandamus directed at the identical federal-question jurisdictional issue presented by the remaining cases pending in the D.C. District Court — including *Panama* and *Sao Paulo*. Argument before the D.C. Circuit took place on October 16, 2001.

stayed the remaining actions — including *Sao Paulo* and *Panama* — pending the resolution of that jurisdictional question by the D.C. Circuit.

REASONS FOR DENYING THE WRIT

The petition should be denied for several reasons. *First*, the outcome of the now-pending proceedings before the D.C. Circuit regarding remand will either cause the petition to become moot and/or place this case in a procedural posture rendering it an inappropriate vehicle for review of any question Petitioner claims it presents. *See* pp. 17-19, *infra*. *Second*, this case does not present the question that Petitioner contends it presents; rather, as the Fifth Circuit expressly observed in *Panama*, the decision below was based upon an "extremely fact intensive and fact bound ... examination of the facts and circumstances of the particular claim" for recusal here. And that fact-bound decision of the court below was correct. *See* pp. 19-26, *infra*. *Finally*, the decision below does not conflict with any decision of this Court or any other court of appeals. *See* pp. 27-30, *infra*.

I. THE INSTANT PETITION WILL EITHER SHORTLY BECOME MOOT AND/OR THE PROCEDURAL POSTURE OF THE ACTION WILL RENDER CERTIORARI INAPPROPRIATE.

As noted above, the *Sao Paulo* case (as well as *Panama*) is now pending before the District of Columbia District Court (together with over two dozen substantially identical cases). All of these cases have been stayed by the district court pending decision by the D.C. Circuit of proceedings already argued before it that present the issue whether federal question jurisdiction is present in such cases.

Regardless of which way the D.C. Circuit decides that issue, it is respectfully submitted that the decision of the D.C. Circuit will either moot Sao Paulo's petition and/or render it

an inappropriate vehicle for review of any issue that Petitioner claims it presents. Thus:

(1) If the D.C. Circuit rules that federal jurisdiction over these cases is lacking, then it could certainly be expected that the D.C. District Court would proceed to remand the *Sao Paulo* case to the Louisiana state court in which it was filed — *i.e.*, the precise result that Sao Paulo hopes to achieve through its petition. Accordingly, Sao Paulo's petition would then be moot.

(2) Conversely, should the D.C. Circuit rule that federal question jurisdiction properly *does* exist over these cases, then the district court plainly will not remand. Instead, it will follow its own prior merits decision — which was affirmed by the D.C. Circuit in *Republic of Guatemala* v. *Tobacco Institute*, 249 F.3d 1068 (D.C. Cir.), *cert. denied*, 122 S. Ct. 463 (2001) — and will grant *dismissal* of the *Sao Paulo* case, along with the over two-dozen other remaining foreign-government cases, based on that binding precedent.

In that eventuality, putting aside the issue whether the petition might likewise become moot, it would at the very least make little sense for this Court to seek to upset such a final judgment in *Sao Paulo* (alone among the many substantially identical cases) to send that single case back to a Louisiana state court, when: (i) the basis of the Eastern District of Louisiana's remand order would — by definition — then be in direct conflict with the decision of the D.C. Circuit on the federal jurisdictional question; (ii) quite apart from any issue of judicial disqualification, it was a patent abuse of discretion for Judge Barbier in the first place to have declined a stay in *Sao Paulo* for the brief period necessary for the order directing MDL transfer of the case to have become final; and (iii) the District of Columbia

Court will then have issued a final judgment on the merits in *Sao Paulo* — a case as to which the D.C. Circuit will then have ruled that there *is* proper federal question jurisdiction — and the arguments raised by the petition have nothing to do either with the basis of that merits determination or the D.C. Circuit's federal jurisdictional determination.

Accordingly, given that — as a result of the proceedings before the D.C. Circuit — the *Sao Paulo* petition will either become moot and/or the case will be placed very much in a procedural posture rendering it inappropriate for certiorari review, the petition should be denied.

II. THE DECISION BELOW WAS A FACT-BOUND DETERMINATION AND DOES NOT PRESENT THE QUESTION THAT PETITIONER CONTENDS IT PRESENTS.

In addition to the mootness/procedural posture reasons set forth above for denial of the writ, there are multiple other reasons why the petition should be denied. Most fundamentally, this case simply does not present the question that Petitioner contends it presents.

Petitioner repeatedly mischaracterizes the decision of the Fifth Circuit below as having "adopted a new legal standard for recusal" in which a district judge is required to recuse "whenever he is mistakenly believed to have a pre-judicial association with a particular legal position relevant to the case or a party's lawyer." Pet. 1 & i (Question Presented); *see also*, *e.g.*, Pet. 4 ("Respondent's argument [is] that disqualification is required in any case of pre-judicial association with a particular legal position."); Pet. 9 (the court below "adopt[ed] the principle of 'issue recusal'"); Pet. 24 ("To hold that disqualification was required in this case, the Fifth Circuit adopted the principle of 'issue recusal'").

Then — predicated entirely upon this mischaracterization of the decision below — the petition launches into a series of dire predictions about how the decision below will supposedly spawn a "cottage industry" of recusal motions; "a new, broad avenue" for litigants to avoid judges negatively inclined toward their cases; and so on. *E.g.*, Pet. 1, 8, 9, 13.

Petitioner's arguments are based upon a misreading of the *Panama* decision below (then followed in *Sao Paulo*). This is not remotely a case — such as Petitioner contends — where recusal was directed on some general "principle of 'issue recusal.'" *E.g.*, Pet. 9. Far from presenting a case adopting some "new legal standard," the decision was expressly based on the court's evaluation of the "'extremely fact intensive and fact bound' ... basis for the appellants' recusal motion," and an "examination of the facts and circumstances of the particular claim" for recusal presented in this case. Pet. App. 34a. These facts included (as discussed more fully at pp. 3-8, *supra*):

- The Louisiana Trial Lawyers Association as amicus in *Gilboy*:

    1. argued adverse to four defendants in that case who were also named as defendants in the instant case;

    2. took positions on core factual and legal issues which are also core factual and legal issues in the instant case; and

    3. condemned these very same defendants — and the specific conduct at issue in both the prior and current litigation — in the harshest possible terms. Indeed, the Association adjudged the *Gilboy* defendants as culpable — *factually, legally, and morally* — for addicting and killing members of the public en masse. *See* pp. 6-7, *supra*.

- The following objective facts concerning Judge Barbier's leadership roles in the Louisiana Trial Lawyers Association, and his connections to *Gilboy*:

    1. Judge Barbier had served as President of the Association until several months before the *Gilboy* brief was filed;

    2. Judge Barbier continued to serve in key leadership positions — as Past President and as a member of the Association's Executive Committee — when the *Gilboy* brief was prepared and filed;

    3. Judge Barbier and his law firm were listed as counsel to the Association (together with present counsel for Panama and Sao Paulo here, Michael X. St. Martin) on a motion to submit the amicus brief in *Gilboy*; and

    4. the published decision of the Louisiana Supreme Court in *Gilboy* lists Carl Joseph Barbier (and present counsel for Panama and Sao Paulo, Mr. St. Martin) as counsel of record to the Association.

Contrary to Petitioner's assertions that the decision below adopted some "new legal standard" of "issue recusal," the decision below turned on a case-specific analysis of the above facts, and there is no reason for this Court to review that fact-bound decision. In an effort to obscure these objective facts upon which the decision below was based, the petition relegates many of them to a footnote and then asserts in conclusory fashion that the Fifth Circuit supposedly "did not accept ... [these] factors" as "bolster[ing] the basis for requiring disqualification." Pet. 7 n.1. But there is nothing in the Fifth Circuit's opinion (either in this case or in *Panama*) to suggest that the court was somehow eschewing reliance on any one or more of the above-stated objective facts. Indeed,

precisely to the contrary, the court's decision in *Panama* (which in turn was the basis for the two-paragraph per curiam order in *Sao Paulo* challenged here) summarized the factual grounds underlying its decision as follows:

> Panama alleges that the defendant tobacco companies conspired to conceal the addictiveness and health risks of tobacco. Panama seeks damages for past and future health costs for diseases caused by smoking ....
>
> Prior to his appointment to the district court, Judge Barbier was president of the Louisiana Trial Lawyer's Association ("LTLA") from approximately October 1989-October 1990. In April 1991, LTLA submitted an amicus brief on behalf of the plaintiffs in a product liability suit against tobacco companies. The LTLA amicus brief alleged that smoking was addictive and caused cancer. The LTLA amicus brief also stated that the tobacco companies have known the dangers of smoking for decades. Judge Barbier's name was listed on the brief as president of LTLA. In February 1999, Judge Barbier denied the motion to recuse, stating that he had not participated in the actual writing of the brief and that his term as president had ended when the brief was filed.
>
> * * *
>
> In April 1991, LTLA filed an amicus brief in a product liability case against tobacco companies in Louisiana state court. Judge Barbier's name is listed on the "Motion for Leave to File Amicus Curiae Brief", which was filed with the amicus brief. Judge Barbier is listed on this filing as President of the LTLA. Also listed as counsel for this motion is Michael St. Martin, who is counsel for Panama in the present action. The amicus brief itself which was attached to the motion was signed by another attorney and does not list Judge Barbier as counsel. While arguably the facts of the Louisiana product liability suit and the present suit may be distinguishable, the amicus brief contained general statements about tobacco companies. These statements included that tobacco use is addictive. The amicus brief also stated that the defendant tobacco companies should be held liable because they were negligent in producing a product that was more dangerous than it was intended to be, and that the companies knew or should have known of the addictive nature of their cigarettes. In the present case, Panama similarly asserts that as a result of defective and dangerous design, testing, manufacturing, marketing and practices, the product produced by the defendants is defective and unreasonably dangerous.

Pet. App. 30a-31a, 34a-35a. In short, Petitioner's assertion that the decision below somehow adopted some aberrant principle of "issue recusal" simply fails to come to grips with the case-specific factual basis upon which the decision below was explicitly based.

Equally unfounded are Petitioner's dire predictions that the decision below will somehow spawn a "cottage industry" of recusal motions; a "new, broad avenue" for litigants; and the like. Indeed, in the almost *19 months* since the Fifth Circuit's decision in *Panama* was issued, that case has been cited only *once* by any court. And that one citation was merely part of a string-cite in footnote 45 of a district court opinion that *denied* recusal, but went on to canvass different "examples of cases in which courts have required recusal." *In re Initial Public Offering Sec. Litig.*, 174 F. Supp. 2d 70, 98 n.45 (S.D.N.Y. 2001). Notably, *Panama* there was correctly distinguished on its facts as follows: "recusal required where judge had been president of organization that filed amicus brief with similar allegations in case against defendants in state court and whose name was on filings in that

case." *Id.* And the decision of the Fifth Circuit in *Sao Paulo* — which ostensibly is the subject of the instant petition, and which consists of but a two-paragraph *per curiam* order — has never been cited at all.*

Moreover, not only was the Fifth Circuit's *actual* decision — rather than the mischaracterization of it portrayed in the petition — a fact-bound determination unworthy of this Court's attention, the decision below was clearly correct. Title 28 U.S.C. § 455(a) provides that "[a]ny ... judge ... shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." It is well settled that recusal is required where an "objective observer" would reasonably question a judge's impartiality. *See, e.g., Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U.S. 847, 860-61 (1988); *Liteky* v. *United States*, 510 U.S. 540, 548 (1994) ("what matters is not the reality of bias or prejudice but its appearance. Quite simply and quite universally, recusal was required whenever 'impartiality might reasonably be questioned'") (quoting 28 U.S.C. § 455(a)).

Applying well-settled law to the objective facts, the Fifth Circuit correctly concluded that recusal was required here *notwithstanding* Judge Barbier's recollections that while he "was vaguely aware of th[e] [Gilboy] case" and "can't explain actually how or why [his] name is listed on there," "[t]he procedure at that time was that the Amicus Committee and the members of the Amicus Committee alone decided whether and when to file amicus briefs. It was not something that was passed by the Board of Governors or Executive Committee or whatever." (Pan. RE6:46; Pan. RE7:91-92). A reasonable observer here would at the very least reasonably

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* Moreover, the fact that six Fifth Circuit judges dissented from the denial of rehearing *en banc* in this case speaks loud and clear that the decision below is *not* going to lead to some broad new highway for the grant of disqualification motions in that Circuit.

question whether an attorney who had so recently completed his term as the Association's President, who continued to serve the Association as Past President and Executive Committee member, and who was listed as "President" of the Association on the motion to file the *Gilboy* brief and also as counsel of record for the Association in the Louisiana Supreme Court's published *Gilboy* opinion itself, had no involvement in such a high-profile and controversial matter. *See also, e.g., Hall* v. *Small Bus. Admin.*, 695 F.2d 175, 179 (5th Cir. 1983) ("[K]nowledge of all the facts implies only knowledge of those that are objectively ascertainable. The term cannot ... extend to what happens in the judge's chambers or to his actual virtue because, were that so, the test would be not the appearance of impartiality but the absence of actual prejudice.") (case cited by *Liljeberg*, 486 U.S. at 860); *In re School Asbestos Litig.*, 977 F.2d 764, 782-84 (3d Cir. 1992).

And even if a reasonable observer would accept without question that Judge Barbier was *not* involved in the preparation or approval of the *Gilboy* brief, a reasonable observer would nonetheless expect that Judge Barbier *shared the views* expressed by the Association in *Gilboy*. Judge Barbier was no mere member of the Association, indeed no mere member of the administration of the Association — he was the immediate Past President and a member of the Association's key governing body, the Executive Committee. Moreover, Judge Barbier was not an "attorney-for-hire" retained to represent a client — such that arguments expressed on behalf of the client should not be equated with the personal views of the advocate. *Cf.* Model Rules of Prof'l Conduct R. 1.2. Rather, here we are dealing with persons volunteering an *amicus* brief precisely to set forth views that they *do* strongly hold. A reasonable observer would expect that — and at minimum reasonably question whether — an attorney who chose to devote great time and energy, without fee, to a group such as LTLA, serving first as its President

and later as its Past President and a member of its Executive Committee, would share the key views and positions espoused by the Association as part of its advocacy efforts in that important case. *Indeed, at no time has Judge Barbier ever stated that he did not share those views.*

Moreover, what puts this case on a different plane entirely is that the Association in *Gilboy* did far more than express a general policy or even a general legal position in an unrelated case. Rather, as noted, the Association brief harshly condemned many of the *same defendants* who are the defendants in this case, based upon allegations of the *very conduct* equally claimed to be wrongful in that case and this one. (And the attorney listed as *co-counsel* with Judge Barbier in that prior proceeding is the very same attorney who then appeared as counsel for plaintiffs Panama and Sao Paulo *before* Judge Barbier in this very litigation.) Under these unusual circumstances, a reasonable observer would certainly question whether Judge Barbier might be less than impartial. To the man in the street, the tobacco-company defendants here faced a stacked deck.*

* And that perception is by no means diminished by the facts that: (1) notwithstanding Judge Barbier's denials of stay in *Panama* and *Sao Paulo*, numerous district court judges both before and after MDL consolidation was directed in these cases have formally or informally granted such stays in *26* substantially identical foreign government cases notwithstanding the pendency of substantially identical remand motions — indeed *all but one* of the other judges presented with the question has done so; and (2) upon the reassignment of these very *Panama* and *Sao Paulo* cases after the Fifth Circuit's decisions, the new judge assigned to these matters (Clement, J.) did not act as Judge Barbier had done and *declined* plaintiff's urging that the court rule on the remand motions prior to finalization of MDL transfer to the District of Columbia.

III. PETITIONER HAS FAILED TO SHOW THAT THE COURT OF APPEALS RENDERED A DECISION IN CONFLICT WITH ANY DECISION OF THIS COURT OR ANY OTHER COURT OF APPEALS.

A. No conflict with any decision of this Court

The Fifth Circuit's decision does not conflict in any way with any decision of this Court.

Petitioner's argument that the decision conflicts with *Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988) is patently without merit. Indeed, far from *conflicting* with this Court's decision in *Liljeberg*, the decision below is very much *supported* by that decision. In *Liljeberg*, this Court held that a judge was required to recuse under § 455(a) where he had an interest in the litigation notwithstanding that he was entirely unaware of that interest. *See id.* at 861. This Court ruled that "[u]nder section 455(a), therefore, recusal is required even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances, would *expect* that the judge would have actual knowledge." *Id.* at 860-61 (quoting 796 F.2d 769, 802 (5th Cir. 1986)) (emphasis added). Thus, *Liljeberg* makes clear that the expectations of a reasonable observer control — even where inconsistent with the trial court's *own professed knowledge or recollection*. *See id.* (citing inter alia, *Hall* v. *Small Bus. Admin.*, 695 F.2d 175, 179 (5th Cir. 1983)).

Also meritless are Petitioner's claims (again purportedly based on *Liljeberg*) that the district court's denial of recusal supposedly constituted "harmless error." *First*, it should be noted that no claim of "harmless error" was made below either in this case or in *Panama*, nor was any such contention even raised in Petitioner's petition for rehearing. As such, the

argument is plainly waived. *See, e.g.*, *TRW Inc.* v. *Andrews*, 122 S. Ct. 441, 451 (2001). *Second*, it is in any event clear that the district court's denial of recusal here was anything but harmless: as noted, following that denial, the district court proceeded on the highly-unusual course of denying a stay pending MDL transfer and directing remand — even though MDL treatment of these foreign-government cases had long since been directed by the MDL Panel and a conditional order of transfer in the *Sao Paulo* case itself had already been issued by the MDL Panel. Notably, the district judge in the Eastern District of Louisiana to whom the *Panama* and *Sao Paulo* cases came to be reassigned following the Fifth Circuit's decisions *declined* to follow that same course — as have numerous other district judges presiding over *26* other substantially identical foreign-government actions that were likewise the subject of similar remand motions. And moreover, as noted above, the D.C. Circuit has now already upheld dismissal of all the federally-filed such foreign government actions (with certiorari having already been denied by this Court from that decision). In these circumstances, the notion that Judge Barbier's denial of recusal here was somehow "harmless" is spurious.

Equally without merit is Petitioner's contention that the decision below somehow conflicts with *Liteky* v. *United States*, 510 U.S. 540 (1994). There, this Court held that where a claim of appearance of bias stems from within the judicial proceedings themselves, recusal is required only in exceptional circumstances involving a "deep-seated and unequivocal antagonism that would render fair judgment impossible." *Id.* at 556. But in the case at bar, the appearance of bias as to Judge Barbier did not stem from any experience with defendants in the case before him; rather it was clearly from an "extrajudicial source" that does readily fall within § 455(a). And likewise off-point is Petitioner's attempt to rely on this Court's reasoning in *Liteky* that "when one of those aspects addressed in [§ 455](b) is at issue, it is poor

statutory construction to interpret [§ 455](a) as nullifying the limitations (b) provides, except to the extent the text requires." *Id.* at 552 n.2. Obviously, as discussed above, the grounds for recusal here go far beyond any "specific aspect" addressed by § 455(b).*

B. No conflict with any decision of any other court of appeals

Petitioner's claims of conflict with decisions of other courts of appeals are similarly predicated upon Petitioner's mischaracterization of the decision below and the grounds for recusal relied upon therein. Petitioner's own discussion amply demonstrates that those other decisions are plainly distinguishable on their facts. A few additional points may be made:

- Notwithstanding Petitioner's suggestion to the contrary, the decision below *was* based on "all the *actual facts* as they appear on the record." Pet. 19 (emphasis in original). Petitioner's suggestion that the Fifth Circuit instead somehow had a "singular focus on the Respondents' allegations of partiality" while failing also to consider the various facts relied upon by Petitioner (*E.g.*, Pet. 23) is totally without basis and finds no support in the record or the decision below.

- As discussed above, the Fifth Circuit's decision did not adopt a principle of "issue recusal." As such, Petitioner's argument (Pet. 24-28) that other courts of appeals do not follow that principle is irrelevant.

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* Moreover, it should be noted that those arguments, too, were never raised below, and were therefore waived. *See* pp. 27-28, *supra*.

- Petitioner attempts to seize upon one part of a sentence from the *Panama* opinion — in which the Fifth Circuit stated that "a reasonable person *might* harbor doubts about the trial judge's impartiality" — to claim that the Fifth Circuit supposedly applied a "standard" in conflict with decisions of other circuits, which require that a reasonable person "*would* harbor doubts about the judge's impartiality." (Pet. 28) (emphasis added). Putting aside that elsewhere in the same *Panama* opinion the Fifth Circuit stated that the applicable standard was "whether a well-informed, thoughtful and objective observer *would* question the court's impartiality" (Pet. App. 34a (emphasis added)) — and the fact that the word "might" is the very word that appears on the face of § 455(a) itself ("any proceeding in which his impartiality *might* reasonably be questioned") (emphasis added) — it is clear in any event that there is no substantive difference in the standard applied by the Fifth Circuit and the other decisions cited by plaintiff.*

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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* Moreover, Petitioner's suggestion that the court below somehow did not apply an "abuse of discretion" standard (Pet. 29-30) is once again belied by the *Panama* opinion itself. *See* Pet. App. 34a ("Denial of recusal is reviewed for abuse of discretion.").

January 31, 2002

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APPENDIX

APPENDIX

MOTION FOR LEAVE OF COURT TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF FILED ON BEHALF OF THE LOUISIANA TRIAL LAWYERS ASSOCIATION (LTLA) IN *GILBOY* v. *THE AMERICAN TOBACCO CO.*

SUPREME COURT OF LOUISIANA

DOCKET NUMBER 90 C 2686

****

ROBERT C. GILBOY

VERSUS

THE AMERICAN TOBACCO COMPANY, ET AL.

****

MOTION OF THE LOUISIANA TRIAL LAWYERS ASSOCIATION FOR LEAVE OF COURT TO FILE AMICUS CURIAE BRIEF

NOW INTO COURT comes Lawrence S. Kullman, Chairman of the Amicus Curiae Committee of the Louisiana Trial Lawyers Association, who respectfully requests leave of court on behalf of the Louisiana Trial Lawyers Association to file an amicus curiae brief in the above captioned matter. The legal issue presented is one which significantly impacts the rights of victims of product caused injuries and is an important matter of Louisiana law. As such, the undersigned respectfully requests that this Court grant the Louisiana Trial Lawyers Association leave to file an amicus curiae brief.

Respectfully Submitted,

/s/ Lawrence S. Kullman

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SUPREME COURT OF LOUISIANA

DOCKET NUMBER 90 C 2686

****

ROBERT C. GILBOY

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****

ORDER

Considering the foregoing,

IT IS ORDERED that the Amicus Curiae Committee of the Louisiana Trial Lawyers Association is granted leave to file an amicus curiae brief in this matter.

New Orleans, Louisiana, this 1st day of May, 1991.

/s/ [Illegible]

[Certificate of Service Omitted]

SUPREME COURT OF LOUISIANA

DOCKET NUMBER 90 C 2686

****

ROBERT C. GILBOY

VERSUS

THE AMERICAN TOBACCO COMPANY, ET AL.

****

ON WRIT TO THE FIRST CIRCUIT COURT OF APPEAL
NUMBER CA90 0696, NINETEENTH JUDICIAL
DISTRICT COURT, PARISH OF EAST BATON ROUGE,
HON. WILLIAM E. BROWN, JUDGE PRESIDING,
NUMBER 314,002

AMICUS CURIAE BRIEF FILED ON BEHALF OF THE LOUISIANA TRIAL LAWYERS ASSOCIATION

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On behalf of The Louisiana
Trial Lawyers Association

[Table of Contents and Table of Authorities Omitted]

MAY IT PLEASE THE COURT:

PREFACE

Scientific Literature — Early 1900s

> "Since the early 1900s scientific literature and historical anecdotes have provided evidence that tobacco use is a form of drug addiction." *The Health Consequences of Smoking: Nicotine Addiction*, A Report of the Surgeon General, 1988. overview, p. 6.
>
> "As early as the 1920s and 1930s, some investigators were concluding that nicotine was responsible for the *compulsive* use of tobacco products..." *Id.*, p. 10.

Cigarette Advertisement — 1954

> "Distinguished authorities point out ... [t]hat there is no proof that cigarette smoking is one of the causes [of lung cancer]." Advertisement of the Tobacco Industry Research Committee, Baton Rouge Morning Advocate, January 4, 1954, Supp. Record, p. 20.
>
> "We believe that the products we make are not injurious to health." *Id.*

Current Addiction Report

> "[D]ifficulty in quitting ... is in large part due to the addicting properties of nicotine ..." Otis R. Bowen, M.D., Secretary, U.S. Dept. of Health and Human Services. Transmittal letter to George Bush, President, Surgeon General's Report.
>
> "This Report shows conclusively that cigarettes and other forms of tobacco are addicting in the same sense

as are drugs such as heroin and cocaine." C. Everett Koop, M.D., Sc.D., Surgeon General. *Id.*, p. vi.

"Cigarettes and other forms of tobacco are addicting. Patterns of tobacco use are regular and compulsive, and a withdrawal syndrome usually accompanies tobacco abstinence." Conclusion from Chapter IV: Tobacco Use Compared to Other Drug Dependencies. *Id.*, p. 215.

Plaintiff's Testimony

"I didn't know how difficult it would be [to quit smoking]." Transcript of video-deposition, cross-examination, p. 18.

"I could have given up heroin more quickly than I could cigarettes." Gilboy Depo., p. 34, Supp. Record, p. 14.

"I went eight days [with no smoking] and I was climbing walls that were nonexistent. . ." Transcript of Gilboy Video deposition, cross-examination, p. 136.

Stockholders' Meeting

"Philip Morris said that countries that do not require warning labels account for about 11 percent of total cigarette sales. Placing warning labels on cigarettes in countries where they are not required *is not useful*, the company said." (Emphasis added.) "Philip Morris shareholders vote against warning proposals," New Orleans Times-Picayune, April 26, 1991, Ex. 3.

INTEREST OF THE LOUISIANA TRIAL LAWYERS ASSOCIATION

The Louisiana Trial Lawyers Association files this brief, amicus curiae, not on behalf of any party, but on behalf of principles of law. In our view, cigarette manufacturers, but not members of the public, knew from the early 1900s that cigarettes were addictive. The manufacturers knew that once purchasers began to smoke — usually in their teens or earlier — it was very difficult, if not impossible, for those smokers to stop. Manufacturers should not be able to argue that the smokers whom they addicted are *totally* barred from recovering for their cancers because those same smokers failed to stop smoking. Their failure was, at least in part, due to the very addiction that was caused by the defendants. Those defendants should not be able to benefit from the addiction that they caused. As one professor has stated, "[t]he plaintiff's continued use of [cigarettes] is not a defense to liability but rather forms the very basis for liability." Garner, Cigarette Dependency and Civil Liability of Cigarette Manufacturers: A Modest Proposal, 53 So. Cal. L. Rev. 1423, 1449 (1980).

The Association has discussed the facts that are specific to this because the case at bar is typical of many other cases involving smokers who were not able to stop smoking.

FACTS

Reports of tobacco addiction go back at least as far as King James. Note, Plaintiffs' Conduct as a Defense to Claims Against Cigarette Manufacturers, 99 Harv. L. Rev. 809, 812-813 (1986). Scientific literature from the early 1900s and from the 1920s and 1930s reported that nicotine was responsible for the "compulsive" use of tobacco. Surgeon General's Report on Nicotine Addiction, pp. 6, 10. Plaintiff, who was born in 1928, started smoking when he was 12 years old. See Depo., Vol. I, pp. 113, 114 and

Videotape depo., Direct Examination, p. 40. Plaintiff, in 1986, after he suffered a seizure, was diagnosed as having cancer of the lung and brain. Gilboy June 16 depo., p. 23. This seizure occurred approximately six years after the 1980 effective date of the amendment to Civil Code art. 2323.

In 1940, when plaintiff started smoking, the cigarette manufacturers, as shown by the Surgeon General's Report, had the reports of addiction available to them. The Surgeon General's Report on Nicotine Addiction reported that the risks of addiction were available from the early 1900s:

> "Since the early 1900s scientific literature and historical anecdotes have provided evidence that tobacco use is a form of drug addiction." *The Health Consequences of Smoking: Nicotine Addiction*, A Report of the Surgeon General, 1988. Overview, p. 6. A copy of the full report is being filed with this amicus brief.

> "As early as the 1920s and 1930s, some investigators were concluding that nicotine was responsible for the *compulsive* use of tobacco products (Armstrong-Jones 1927; Dorsey 1936; Lewin 1931). Johnston (1942) concluded that, 'smoking tobacco is essentially a means of administering nicotine, just as smoking opium is a means of administering morphine.'" (Emphasis added.) *Id.*, p. 10.

Indeed, it has been noted that, as early as 1604, "King James is said to have been disgusted at the fact that tobacco users were 'obstinately addicted.'" Plaintiffs' Conduct as a Defense to Claims Against Cigarette Manufacturers, 99 Harv. L. Rev. at 815 n.35. (A copy of the note is attached as Ex. 1.)

In order to assuage whatever concerns potential smokers might have had about smoking the manufacturers advertised that "Distinguished authorities point out . . . [t]hat there is no

proof that cigarette smoking is one of the causes [of lung cancer]." See Advertisement of the Tobacco Industry Research Committee adopted by the cigarette manufacturers. Supp. Record, p. 20. (A copy of the advertisement is attached as Ex. 2.)

And, *even in 1954*, cigarette manufacturers — including the defendant manufacturers herein — were advertising that "We believe that the products we make are not injurious to health." *Id.*

Surgeon General Koop, in his 1988 Report on Nicotine Addiction, noted:

> "This Report shows conclusively that cigarettes and other forms of tobacco are addicting in the same sense as are drugs such as heroin and cocaine." C. Everett Koop, M.D., Sc.D., Surgeon General. *Id.*, p. vi.

The report also includes other conclusions as to the addictive consequences of smoking:

> "Despite the significant health risks of tobacco use outlined in previous reports, many smokers have great difficulty in quitting. This report concludes that such difficulty is in large part due to the addicting properties of nicotine, which is present in all forms of tobacco." Otis R. Bowen, M.D., Secretary, U.S. Dept. of Health and Human Services. Transmittal letter to George Bush, President, Surgeon General's Report.

> "The pharmacologic and behavioral processes that determine tobacco addiction are similar to those that determine addiction to drugs such as heroin and cocaine." Conclusion from Chapter V: Tobacco Use Compared to Other Drug Dependencies. *Id.*, p. 15.

In light of the addictive qualities of defendants' products, is it any wonder that plaintiff could not quit smoking. Defendants' counsel asked plaintiff whether he knew, when he started, that it would be difficult for him to quit. Of course, the defendants never warned Mr. Gilboy that he could become addicted. However, now they try to use his addiction as a defense. In any event, plaintiff responded: "*I didn't know how difficult it would be.*" (Emphasis added.) Video Depo., Cross-examination, p. 18. Even with the addiction, plaintiff was able to stop for 8 days. Here is what happened:

> "Q. You went to see the doctor, and he suggested that you stop smoking?
>
> "A. Oh, yeah.
>
> "Q. Did you stop smoking?
>
> "A. I went eight days, okay., *and I was climbing walls that were nonexistent*, and I never did go back to see him as a patient again." (Emphasis added.) Transcript of video-deposition, cross-examination, p. 136.

Mr. Gilboy's testimony as a sufferer reflects what the scientific literature has reported since at least the 1920s. Mr. Gilboy stated: "*Sir, I could have given up heroin more quickly than I could cigarettes.*" Depo., p. 34, Supp. Record, p. 14. (Emphasis added.)

Do the defendants warn about addiction now? They talk about preemption. That is a false defense. They refuse to place *any* warning labels on any cigarettes that they export *unless* the importing country requires the warnings. Ex. 3. They don't even warn about cancer. So much for their good faith. And when they get sued, they claim that the cancer is the smoker's fault because he smoked. The companies will continue to sell cancer until they know that they will have to pay for the needless deaths and the needless suffering that

they inflict — unless they are prohibited from claiming that the addiction that they have caused is a defense against people being able to recover for cancer and death.

ARGUMENT

I. THE COURT OF APPEAL ERRED AS A MATTER OF LAW WHEN IT STATED THAT THE DEFENDANTS OWED NO DUTY OF CARE TO THE PLAINTIFF. THAT ANALYSIS INJECTED THE PROHIBITED ASSUMPTION OF RISK DOCTRINE INTO A DUTY/RISK ANALYSIS "THROUGH THE BACK DOOR"

The court of appeal, in affirming the trial court's granting of defendants' motion for summary judgment, erroneously held that plaintiff voluntarily smoked and that "smoking cigarettes is a simple consumer decision entered into with warnings of the possible consequences." *Gilboy* v. *American Tobacco Co.*, 572 So. 2d 289, 290 (La. App. 1st Cir. 1990). The court of appeal also erroneously held the following:

> "[W]e are unable to classify health injuries from a lifetime of *voluntary* smoking as accidental. Choices have consequences. Mr. Gilboy chose to begin and *continue smoking*, knowing that it was dangerous to his health. He now looks to the courts to protect him or at least somewhat insulate him from a series of daily decisions stretching from the present all the way back to the 1940's, when he was a teenager." (Emphasis added.) *Id.* at 291.

In so stating, the court ignored the plaintiff's own testimony about his addiction and what occurred when he tried to stop: "I was climbing walls that were non-existent." The court therefore did what was prohibited in deciding a motion for summary judgment — it ruled on a question of fact with regard to which there was a genuine issue when it held that

plaintiff voluntarily continued to smoke. It also ignored the Report of the Surgeon General that nicotine was addictive and that the addiction would prevent people from being able to stop smoking. The court, after its statement about the warnings, added the following:

> "Mr. Gilboy had the legal right to choose to smoke. He also had the knowledge that this could seriously jeopardize his health. The law would protect him from a product that had a hidden defect. The law would protect him from a product that lacked an adequate warning. The law would even protect him from harm arising from the misuse of a defective product. However, the law will not protect him from himself. Based on the uncontested facts of record in this case, we conclude as a matter of law that the risk complained of by the plaintiff *is not within the ambit of protection of the duty of care required of a cigarette manufacturer*." (Emphasis added.) 572 So. 2d 291-292.

When the court stated that "[t]he law would protect him from a product that lacked an adequate warning," it ignored the fact that the original warnings on cigarettes were indeed inadequate. The tobacco companies, for obvious reasons, never gave the following warning: "We will get you as hooked on cigarettes as you would be on heroin." Even now, they refuse to put *any* warnings on cigarette that they export to foreign countries — unless they are required to do so by the laws of the the foreign countries. See Ex. 3.

The court of appeal's holding of "no duty" is virtually identical to the very holding of "no duty" that was prohibited by this Court in *Murray* v. *Ramada Inns, Inc.*, 521 So. 2d 1123 (La. 1988). In *Murray*, this Court rejected an identical "no duty" defense. It first stated the defense argument:

> "Another argument raised by the defendants deserves attention here, because in light of our holding

> today, similar arguments might arise in future cases. Defendants suggest that, leaving aside the doctrine of assumption of risk, they should not be liable because they had *no duty* to protect the decedent from a danger of which he had knowledge. In essence, defendants contend here that they were *not negligent* because the plaintiff voluntarily encountered the risk." *Murray* v. *Ramada Inns, Inc.*, 521 So. 2d 1123, 1135 (La. 1988). (Emphasis by the court.)

In rejecting that argument, this Court held:

> "The Fifth Circuit wisely rejected this contention. 821 F.2d at 276. If accepted, defendants' argument would inject the assumption of risk doctrine into duty/risk analysis '*through the back door*.' By that, we mean that the argument attempts to define the defendant's initial duty in terms of the plaintiff's actual knowledge, and thereby seeks to achieve the same result which would be reached if assumption of risk were retained as a defense, i.e., a total bar to the plaintiff's recovery.
>
> "A defendant's duty should not turn on a particular plaintiff's state of mind, but instead should be determined by the standard of care which the defendant owes to all potential plaintiffs." *Id.*, at 1136.

The defendants' "no duty" argument was rejected in another cigarette case by the Supreme Court of New Jersey. *Dewey* v. *R.J. Reynolds Tobacco Co.*, 577 A.2d 1239 (N.J. 1990). The supreme court in *Dewey* noted:

> "Defendants' argument completely ignores the extensive efforts of the tobacco manufacturers to saturate the public with information regarding the benefits of cigarette smoking, the aim of which is to rebut the assertions of public-health advocates and the Surgeon

General. We note that in the ensuing quarter-century since the 1964 Surgeon General's Advisory Committee Report, government interest in the societal cost and hazards of smoking has not abated. A bill recently introduced in Congress would provide for grants for advertisements to discourage smoking, the sponsor charging that 'tobacco companies target [] women, teenagers and minority groups for their new products and advertising.' New York Times, Feb. 21, 1990, at A18. Public opinion surveys as well as Federal Trade Commission reports suggest that the tobacco companies' efforts at rebuttal have been successful, thus raising a material issue of fact regarding consumer awareness of the dangers of smoking. Federal Trade Commission, *Report to Congress, Pursuant to the Federal Cigarette Labeling and Advertising Act*, June 30, 1967. We are unable, therefore, to decide that as a matter of public policy, manufacturers of cigarettes should be immunized from liability for the harms caused by their products." *Id.* at 1254-1255. (A copy of the opinion is attached. Ex. 4.)

Thus, the defendants may not escape liability based on a "no duty" defense.

II. "ASSUMPTION OF RISK" IS NO LONGER AVAILABLE AS A DEFENSE UNDER LOUISIANA LAW

When the court of appeal held that Mr. Gilboy voluntarily continued to smoke and that his voluntary smoking was a total bar, it in essence held that plaintiff assumed the risk of his smoking. This Court has rejected that very holding. This Court, in 1988, responded to a question that had been certified to it by the United States Court of Appeals for the Fifth Circuit. In its response, this Court squarely held:

"[T]he common law doctrine of assumption of risk no longer has a place in Louisiana tort law. The types of plaintiff conduct which the defense has been used to describe are governed by civilian concepts of comparative fault and duty/risk. Assumption of risk should not survive as a distinct legal concept for any purpose, and certainly can no longer be utilized as a complete bar to the plaintiff's recovery.

"Because the term 'assumption of risk' is almost always used to describe plaintiff conduct that is indistinguishable from contributory negligence, it would make no sense for us to hold otherwise. Under article 2323, plaintiff negligence results only in a comparative reduction of recovery, and it would be anamolous [sic] for us to hold that the same conduct which results only in a reduction of recovery when it is described as 'comparative negligence' somehow should operate as a total bar to recovery when described as 'assumption of risk.' As another state supreme court considering this issue has concluded, 'it would be the ultimate legal inconsistency to reject contributory negligence as an absolute defense yet at the same time allow its effect to continue under the guise of assumption of risk.' *Salinas* v. *Vierstra*, 107 Idaho 984, 695 P.2d 369, 374 (1985)." *Murray* v. *Ramada Inns, Inc.*, *supra*, 521 So. 2d at 1132-1133.

Thus, an assumption of risk defense would be improper under Louisiana law. Defendants argue that plaintiff knew of all the risks of smoking and therefore they cannot be liable to plaintiff for his cancer. Interestingly, they seem to disassociate themselves from a claim that this is an assumption of risk defense — although that is really their argument. They also urge the prohibited "no duty" argument. For instance, in distinguishing *Murray*, appellees state:

> "The issue of assumption of risk is not even reached in cases such as this one, in which the defendants either owed no duty because of the well-known nature of the alleged risks of smoking, or did not breach the duty owed, due to a lack of proximate cause between the alleged failure to warn and Mr. Gilboy's injuries." Original Brief of Defendant-Appellees, p. 15.

However, that argument fails because it attempts to gloss over two critical issues in this case: whether plaintiff, *when he started smoking at age 12*, was warned that he could become addicted and, even if he was so warned, whether a 12-year-old could have sufficient experience to understand the risk of addiction.

III. COMPARATIVE NEGLIGENCE AND NOT CONTRIBUTORY NEGLIGENCE SHOULD BE APPLIED IN THIS CASE

Plaintiff, in 1986, was diagnosed as having cancer of the lung and brain. Gilboy June 16 depo., p. 23. This seizure occurred approximately six years after 1980 which year was the year that the amendment to Civil Code art. 2323 became effective.

Plaintiff had no cause of action for his lung cancer until he knew that he had that cancer. Therefore, the comparative negligence that was provided by the amendment to article 2323 applies. Thus, plaintiff's contributory negligence, if any, would not bar — but would only reduce — his claim. The amount of the reduction, if any, would be a question for the jury and is certainly not a question that is subject to summary judgment.

Indeed, comparative negligence — and not contributory negligence — would apply to Mr. Gilboy's claim even if article 2323 had not been amended. As this Court pointed out after discussing the history of the previous version of article

2323: "Contributory negligence has never been part of our legislated law and is now expressly prohibited by statute." *Bell* v. *Jet Wheel Blast*, 462 So. 2d 166, 171 (La. 1985). *It should be noted that the Bell accident arose prior to the enactment of the amendment to article 2323.* (The dissent of Justice Marcus makes clear that the accident in *Bell* occurred before August 1, 1980, the effective date of the amendment. *Id.* at 174.) This Court, in responding to a certified question from the United States Fifth Circuit Court of Appeals, held that contributory negligence was no defense to the plaintiff's strict product liability claim that arose prior to the amendment. Rather, this Court held that comparative fault should be applied to that pre-amendment case. *Id.* at 173. A later court of appeal has also noted that comparative negligence has always been the proper legal defense in Louisiana. *Walker* v. *Maybelline Co.*, 477 So. 2d 1136, 1140 (La. App. 1st Cir. 1985), writ den. 481 So. 2d 1333: "We note that contributory negligence is no longer a defense in products liability cases. Rather, the proper defense under the Civilian system has always been comparative negligence."

Thus, the defense that should be applied in the case at bar is one of comparative negligence and not one of contributory negligence.

IV. DEFENDANTS SHOULD BE BARRED FROM RAISING THE DEFENSE THAT PLAINTIFF WAS NEGLIGENT IN CONTINUING TO SMOKE AFTER HE BECAME ADDICTED. CIGARETTE MANUFACTURERS SHOULD NOT BE ABLE TO TAKE ADVANTAGE OF THE VERY ADDICTION THAT THEY HAVE CAUSED

According to the Surgeon General's report, early scientific literature reported that tobacco use is addictive:

"Since the early 1900s scientific literature and historical anecdotes have provided evidence that tobacco use is a form of drug addiction.

* * *

"As early as the 1920s and 1930s, some investigators were concluding that nicotine was responsible for the *compulsive* use of tobacco products (Armstrong-Jones 1927; Dorsey 1936; Lewin 1931). Johnston (1942) concluded that, 'smoking tobacco is essentially a means of administering nicotine, just as smoking opium is a means of administering morphine.'" (Emphasis added.) Surgeon General's Report, pp. 6, 10.

One author has explored in depth the liability of cigarettes manufacturers for their failure to warn smokers of addiction. Garner, Cigarette Dependency and Civil Liability of Cigarette Manufacturers: A Modest Proposal, 53 So. Cal. L. Rev. 1423, 1434-1465 (1980). He has noted that "[t]he plaintiff's continued use of [cigarettes] is not a defense to liability but rather forms the very basis for liability." *Id.* at 1449. That very basis would apply in Louisiana.

Under Louisiana law, a manufacturer is presumed to know the defects of his products. See, *e.g.*, *Spillers* v. *Montgomery Ward & Co., Inc.*, 294 So. 2d 803, 807 (La. 1974). It would be a "Catch 22" travesty to permit a cigarette manufacturer to sell an addicting product and then be able to claim that the addicted plaintiff's recovery should be reduced because that addicted plaintiff failed to stop smoking.[1] See *Boyer* v. *Johnson*, 360 So. 2d 1164 (employer of minor not permitted to raise the defense of contributory negligence of

[1] The argument of the manufacturers is similar to the classic story of the criminal defendant who shoots both of her parents and then pleads for mercy because she is an orphan.

the minor). As Prof. Alston Johnson has pointed out with regard to the new Civil Code art. 2323:

"[C]ontributory negligence is not applicable when defendant is negligent and his duty extends to the protection of plaintiff against his own carelessness. Such cases correspond to category (a) previously discussed." (Footnote omitted.) Comparative Negligence and the Duty/Risk Analysis, 40 La. L.R. 319, 339 (1980).

Cf., *e.g.*, *Clair* v. *Paris Road Drugs, Inc.*, 573 So. 2d 1219 (La. App. 4th Cir. 1991), writ den. __ So. 2d __. Plaintiff, a major, sued a pharmacist for illegally refilling prescriptions. She was aware of what she was doing and was not addicted *when she began* soliciting the drugs from the pharmacist. "Under a different factual setting" there might not be a reduction for comparative negligence. *Id.* at 1225.

If the plaintiff's smoking is admissible as a potential defense, it is certainly a jury question as to whether the plaintiff *voluntarily* continued to smoke or whether his addiction stopped him from breaking his habit. Plaintiff testified as to what happened on one occasion when he tried to stop smoking:

"Q. You went to see the doctor, and he suggested that you stop smoking?

"A. Oh, yeah.

"Q. Did you stop smoking?

"A. I went eight days, okay, and I was climbing walls that were nonexistent, and I never did go back to see him as a patient again." Video deposition, cross-examination, p. 136.

Mr. Gilboy also testified: "Sir, I could have given up heroin more quickly than I could cigarettes." Gilboy Depo., p. 34, Supp. Record, p. 14.

A jury would be entitled to decide whether plaintiff's failure to stop was caused by his nicotine dependence or whether he "voluntarily" decided to continue to smoke. Thus, again, the summary judgment should have been denied.

V. CIGARETTES ARE UNREASONABLY DANGEROUS PER SE BECAUSE THEY MAKE PEOPLE ADDICTS AND BECAUSE THEY KILL PEOPLE

The defendants are liable under strict liability. They are also liable for their negligence in producing a product that was more dangerous than it was intended to be. They are also liable because they knew or should have known of the addictive character of their cigarettes and were therefore negligent in failing to warn smokers that their cigarettes convert smokers into addicts.

It has been noted that as early as 1604, "King James is said to have been disgusted at the fact that tobacco users were 'obstinately addicted.'" Plaintiffs' Conduct as a Defense to Claims Against Cigarette Manufacturers, 99 Harv. L. Rev. at 815 n.35, Ex. 1. The Surgeon General's Report notes that scientific literature has, since the early 1900s, reflected the addiction. Surgeon General's Report, pp. 6, 10. As noted these publications predated 1940 when plaintiff started smoking at the age of 12.

Defendants note that "[t]o find a product unreasonably dangerous per se, a jury would have to determine that the product was 'too dangerous to be placed on the market.'" Appellees Brief, p. 19, citing *Halphen* v. *Johns-Manville Sales Corp.*, 484 So. 2d 110, 118 (La. 1986). Were cigarettes

"too dangerous in 1940 to be placed on the market?" *Suppose cigarette companies between 1940 and 1966 had to apply to the Food and Drug Administration to obtain F.D.A. approval to market their product as a drug.* Is there any doubt that they would not have been able to obtain that approval. A drug that kills 300,000 persons per year would certainly never obtain approval. Thus, regardless of the knowledge or lack of knowledge of the defendants as to the addictive effects of their cigarettes, they are liable for their products because those products are unreasonably dangerous per se. Were the defendants also negligent in failing to warn about the addiction? Certainly they were. At the *bare* minimum, the failure to warn is a jury question. *Perhaps* after 1966 the failure to warn argument is preempted. However, it should be noted that the United States Fifth Circuit has held that the plaintiff's "unreasonably dangerous claims" under *Halphen* were not preempted by the Cigarette Labeling Act. *Pennington* v. *Vistron Corp.*, 876 F.2d 414, 417 et seq. (5th Cir. 1989). In any event, plaintiff's unreasonably dangerous claim is clearly available for sales up to 1966. Plaintiff's strict liability claim would also predate the 1966 Labeling Act and would be available regardless of whether preemption applies.

Indeed, in another cigarette cancer case, an Indiana court noted that a cigarette manufacturer's failure to warn of the addictive properties of cigarettes could render the cigarettes unreasonably dangerous. The court held:

> "Failing to warn the consumer of certain properties, such as nicotine addiction, in conjunction with its harmful qualities, render the product unreasonably dangerous, *i.e.* in a condition the ordinary consumer would not contemplate." *Rogers* v. *R.J. Reynolds Tobacco Co.*, *supra*, 557 N.E.2d at 1053 n.8. Ex. 5.

The addictive properties of the cigarettes — if nothing else — make those products unreasonably dangerous per se under *Halphen*. Further, under *Halphen*, the defendants are responsible for their negligence in selling addictive cigarettes because they either knew or should have known of the prior literature about those addictive properties. They are therefore clearly liable under *Halphen* for the cigarettes they sold prior to 1966 and the addiction and the cancer they caused. Further, they are liable for their post-1966 sales because, as additionally discussed below, the Labeling Act did not preempt the unreasonably dangerous per se claim under *Halphen*.

VI. PREEMPTION IS NO DEFENSE

It should be noted that there is no preemption of *Halphen*-type claims that cigarettes are unreasonably dangerous. *Pennington* v. *Vistron Corp.*, 876 F.2d 414 (5th Cir. 1989), discussed *supra*. Further, at least one state supreme court has rejected cigarette manufacturers' arguments that the Labeling Act preempted a plaintiff's claims for the wrongful death of her husband. *Dewey* v. *R. J. Reynolds Tobacco Co.*, 577 A.2d 1239, 1251 (N.J. 1990). Ex. 4. *Contra*, *Rogers* v. *R.J. Reynolds Tobacco Co.*, 557 N.E.2d 1045, 1051 (Ind. App. 1990). Ex. 5. However, the court in *Rogers* did hold that preemption did not apply to conduct that preceded January 1, 1966.

It should also be noted that the United States Supreme Court, on March 25, 1991, granted a writ of certiorari in a case that involves the preemption issue. *Cipollone* v. *Liggett Group, Inc.*, No. 90-1038, 59 U.S.L.W. 3543. The Supreme Court granted certiorari *in a petition filed by the plaintiff* from *Cipollone* v. *Liggett Group, Inc.*, 893 F.2d 541 (3d Cir. 1990).

VII. DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT

Defendants are not entitled to a summary judgment for a variety of reasons. Some of those reasons have already been discussed and will be discussed in further detail below.

A. Plaintiff became addicted to nicotine and could not stop smoking. It is at least a jury question whether plaintiff was warned of his potential addiction, whether he "voluntarily" continued to smoke

Defendants, in an attempt to evade the holding and logic of *Murray*, argue that there was no proximate cause "between the failure to warn and Mr. Gilboy's injuries." Putting aside, for the sake of argument, whether a 12-year-old could be adequately warned of the potential addiction, at the bare minimum it is a jury question as to the warning and whether there was proximate cause. As has been noted in the Harvard Law Review:

> "Competence determinations are a complex factual matter, requiring a retrospective analysis of a plaintiff's knowledge, mental capacity, and awareness of the risks as a minor. In the cigarette cases, the industry will have to face the allegation that it has deliberately appealed to minors, 'seducing' them to become cigarette addicts before they were competent to assess the risks of smoking." (Footnotes omitted.) Note, Plaintiffs' Conduct as a Defense to Claims Against Cigarette Manufacturers, 99 Harv. L. Rev. 809, 813 (1986). Ex. 1.

In another cigarette cancer case, an Indiana Court of Appeals rejected the same "lack of proximate cause" argument that defendants are raising here:

"[Decedent Richard Rogers's] knowledge also may be relevant to the element of causation. However, we note the trial court could not have granted summary judgment on the ground the Defendants' failure to warn of the addictive properties of their cigarettes was a contributing cause of Richard's injury. Defendants did not negate the existence of issues concerning whether Rogers's admission that cigarettes were 'more than just habit forming' evidenced his knowledge he suffered from a clinical condition, i.e., addiction, and whether a warning which adequately conveyed that fact to him would have altered his conduct as far as the type of treatment he might have sought to overcome the addiction. Also, Richard's use of the term 'addiction' to describe his compulsion to smoke cigarettes merely raises a factual issue concerning whether he was aware of the clinical implications of his condition." *Rogers* v. *R.J. Reynolds Tobacco Co.*, 557 N.E.2d 1045, 1054 n.10 (Ind. App. 1990), Ex. 5.

Just as there were jury questions in *Rogers* regarding the decedent's addiction, so there are jury questions in the case at bar as to the plaintiff's addiction.

B. There are jury questions as to whether, in 1940, plaintiff, a 12-year-old, knew of the addictive qualities of cigarettes and whether, in 1940, members of the public had such knowledge

The Indiana appellate court in *Rogers* rejected the defense argument that cigarette manufacturers were entitled to a summary judgment since the addicting "properties" of cigarettes were well known in 1940. (Mr. Gilboy, who was born in 1928, and who started smoking when he was 12, would have started in or around 1940. See Depo., Vol. I, pp.

113, 114 and Videotape depo., Direct Examination, p. 40.) The court in *Rogers* stated:

> "Defendants argue the 'health risks' of smoking are well within the contemplation of the ordinary consumer possessing ordinary knowledge common to the community as to the characteristics of cigarettes and that the habituating propensities of smoking have long been common knowledge.' Appellee's Brief at 20. However, Yvonne [Rogers] draws a distinction between the addictive, as opposed to habituating, qualities of cigarettes. There is no basis for our judicially noticing what the ordinary consumer's knowledge concerning the addictive qualities of cigarettes may have been when Richard began smoking in 1940. The state of knowledge attributable to the community of individuals consuming cigarettes has changed over time and will continue to do so. It was not until 1988 that the Surgeon General published a report informing of the addictive nature of cigarettes.
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> * * *
>
> "As for cigarettes, the record is devoid of any evidence as to the state of the common knowledge of the consumer as to the addictive qualities of cigarettes at the time Richard began smoking." (Footnote omitted.) *Id.* at 1054.

In rejecting the defense argument, the court concluded:

> "We cannot state, as a matter of law, that knowledge of health risks associated with cigarettes overshadows knowledge of the risk of developing an addiction to cigarettes which, if medically unchecked, will result in the consumer's involuntary progression toward debilitating disease and probable death. Instead, it is a question of fact whether a consumer who chooses to use

cigarettes without knowledge of the risk of addiction to the cigarettes, which would prevent him from discontinuing use of the cigarettes and incurring the associated health risks, does so unreasonably." *Id.* at 1055.

Similarly, in the case at bar, there are questions of fact regarding addiction that preclude a summary judgment.

The law is clear, of course, that summary judgments "should be used cautiously and sparingly; any reasonable doubt should be resolved against mover in favor of full trial on the merits." *Penalber* v. *Blount*, 550 So. 2d 577, 583 (La. 1989). Further, "it is rarely appropriate for a determination based on subjective facts such as intent, motive, malice, knowledge or good faith." *Id.* In the case at bar, the question of whether plaintiff's continued smoking was voluntary is a subjective fact that would make a summary judgment particularly inappropriate. Further, the question of the "knowledge" of a party is also not appropriate for disposition by summary judgment. *Rodgers* v. *Johnson*, 557 So. 2d 1136, 1139 (La. App. 2d Cir. 1990).

There are a variety of factual issues that must be determined. Some of those issues are:

1. Should the defendants have warned that smokers could become addicted to nicotine?

2. Was plaintiff's failure to stop smoking "voluntary"?

3. Did plaintiff fail to stop smoking because he was addicted to nicotine?

4. What percent of fault lies with plaintiff and what percent of fault lies with defendants?

5. Assuming, for the sake of argument, that actual knowledge of the defendants was required, did defendants have actual knowledge that they were causing people to become addicted?

6. Should defendants have known of the scientific literature of the 1900s that smokers were becoming addicted to nicotine?

7. Were defendants negligent in failing to warn the plaintiff of health and addiction risks?

8. Are cigarettes unreasonably dangerous?

Those issues present genuine issues of fact and preclude summary judgment in the case at bar.

CONCLUSION

It is respectfully submitted that the judgment of the court of appeal should be reversed and that the case should be remanded for a trial on the merits.

Respectfully Submitted,

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